FILED BY CLERK
JAN 11 2007
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. WILLIAM KENNETH STILLWELL, Petitioner.	2 CA-CR 2006-0110-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20012161

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hooker, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Petitioner William Kenneth Stillwell was convicted after a jury trial of eight counts of sexual assault, three counts each of burglary, aggravated assault, and kidnapping, and two counts each of armed robbery and sexual abuse. The trial court imposed a combination of sentences that totaled 161 years' imprisonment. On appeal, he contended the trial court had erred by imposing aggravated prison terms. This court affirmed. *State v. Stillwell*, No. 2 CA-CR 2002-0122 (memorandum decision filed Sept. 29, 2003). We issued our mandate on June 29, 2004. Shortly thereafter, Stillwell commenced this post-conviction

proceeding pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. He filed a petition in September 2005. Although the trial court granted partial relief, affording him a bench trial to determine whether he had a prior felony conviction for aggravation purposes, it rejected his claim that he had a Sixth Amendment right under the United States Constitution to have a jury make that determination. Based on the prior conviction, which the court found the state had proved beyond a reasonable doubt, the court resentenced him, again imposing aggravated terms. In this petition for review, Stillwell insists he was entitled to have a jury determine the fact of the prior conviction beyond a reasonable doubt.

¶2 We will not disturb a trial court's ruling absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We see no such abuse here. Stillwell acknowledges that, in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The fact of a prior conviction was again excepted by the Court from the right to a jury trial on sentencing factors in *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004). Our supreme court has noted this exception, *see State v. Grell*, 212 Ariz. 516, ¶ 43, 135 P.3d 696, 706 (2006); *State v. Fell*, 210 Ariz. 554, ¶¶ 8-9, 115 P.3d 594, 597 (2005); *State v. Ring*, 204 Ariz. 534, ¶ 55, 65 P.3d 915, 937 (2003), as has this court. *See State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005).

¶3 Stillwell asks us to consider whether the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998), the source of

the exception of prior convictions, is still viable in light of language in *Apprendi*, an argument we rejected in *Keith*. As we stated there, "We are not allowed to anticipate how the Supreme Court may rule in the future." 211 Ariz. 436, ¶ 3, 122 P.3d at 230. Stillwell also relies on Justice Thomas's comment in his partial concurrence in *Shepard v. United States*, 544 U.S. 13, 27, 125 S. Ct. 1254, 1264 (2005), that "*Almendarez-Torres* . . . has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." And, Stillwell suggests, it would serve the truth-finding process to have a jury, rather than a judge, decide this issue, given factual questions about identity that may exist. But the exception for prior convictions remains the law, and we may not deviate from that clearly established and as yet unchanged precedent. *Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d at 230.

¶4 The petition for review is granted but relief is denied.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

GARYE L. VÁSQUEZ, Judge